

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN D. CARRICO
Claimant

VS.

ASSOCIATED WHOLESALE GROCERS
Self-Insured Respondent

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Docket No. 1,050,351

ORDER

Respondent appealed the February 11, 2014, Award entered by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on June 3, 2014.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Karl Wenger of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant sustained a January 10, 2010, accident while working for respondent. ALJ Belden awarded claimant permanent partial disability benefits for a 5% leg impairment for the right knee, a 20% lower leg impairment for the left ankle and a 15% leg impairment for the left knee.

Respondent contends the ALJ erred in calculating claimant's injuries to his left ankle and left knee as separate awards rather than converting the impairment under the AMA

*Guides*¹ into a single regional impairment encompassing all injuries pursuant to K.S.A. 44-510d(b)(24) as amended in 2011. It asserts the statute as amended in 2011 is a procedural rule and thus should be applied in this case despite claimant's date of accident occurring before May 15, 2011. Respondent requests the Board find that claimant's left ankle and left knee impairments should be combined into a single impairment to the left lower extremity.

Claimant requests the Board affirm the Award. Claimant asserts nothing in the 2011 amendments suggests retroactive application of K.S.A. 2011 Supp. 44-510d(b)(24) was contemplated.

The sole issue before the Board is: should K.S.A. 2011 Supp. 44-510d(b)(24) be applied retroactively?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. The Board adopts the ALJ's findings of fact as its own as if specifically set forth herein, except as noted.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-510d(b) provides, in part:

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(24) Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, the functional impairment attributable to each scheduled member shall be combined pursuant to the fourth edition of the American medical association guides for evaluation of permanent impairment and compensation awarded shall be calculated to the highest scheduled member actually impaired.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

At the time of claimant's injury, what is now K.S.A. 2011 Supp. 44-510d(b)(23)² was in effect, but K.S.A. 2011 Supp. 44-510d(b)(24) had yet to be enacted. For many years, what is now K.S.A. 2011 Supp. 44-510d(b)(23) was interpreted to mean that if a claimant sustained separate impairments to an extremity, under the *Guides*, those impairments would be combined into one impairment for the entire extremity using the Combined Values Chart. For example, if a claimant sustained left ankle, knee and foot impairments, for calculation purposes, they would be combined into a single left lower extremity impairment. That interpretation of what is now K.S.A. 2011 Supp. 44-510d(b)(23) was overturned by the Kansas Supreme Court in *Redd*³ and *Mitchell*.⁴ In *Redd*, the Kansas Supreme Court stated:

Using the statutory construction analysis recited above, we hold the best way to reconcile K.S.A. 44-510d(a)(23) with the statutory schedule is to use the *Guides* as a mechanism to evaluate impairment at the level of the injury and not to apply its provisions that call for combining injuries first into regional, and then whole body, impairments. As such, separate awards should be provided at each injury level. The Board majority correctly calculated Redd's award.⁵

In determining whether K.S.A. 2011 Supp. 44-510d(b)(24) should be applied retroactively, the Board is mindful of K.S.A. 44-505(c), which was not amended in 2011, which states:

This act shall not apply in any case where the accident occurred prior to the effective date of this act. All rights which accrued by reason of any such accident shall be governed by the laws in effect at that time.

The Board is also cognizant of K.S.A. 44-535, which was not amended in 2011, which states:

The right to compensation shall be deemed in every case, including cases where death results from the injury, to have accrued to the injured workman or his dependents or legal representatives at the time of the accident, and the time limit in which to commence proceedings for compensation therefor shall run as against him, his legal representatives and dependents from the date of the accident.

² K.S.A. 44-510d(a)(23) became K.S.A. 2011 Supp. 44-510d(b)(23) as a result of the 2011 amendments to the Kansas Workers Compensation Act.

³ *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

⁴ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

⁵ *Redd*, 291 Kan. at 198.

Claimant's accident occurred on January 10, 2010, and, therefore, the provisions of the Kansas Workers Compensation Act at that time (Old Act) apply. Respondent argues K.S.A. 2011 Supp. 44-510d(b)(24) is procedural and, therefore, should be applied retroactively. Respondent cites *State v. Chapman*⁶ in support of its position. In that case, Chapman was charged with speeding. Under the law in effect at the time Chapman received the speeding citation, he was entitled to a jury trial. After he received the speeding citation, but before Chapman's trial date, the law was amended so speeding violations were tried to the court. Chapman insisted the law was not retroactive and he was entitled to a jury trial, because the law amended was a substantive, not a procedural, law. The Kansas Court of Appeals agreed, stating:

Courts in other states have wrestled with the distinction between substantive and procedural law; one fairly representative definition is found in *State, ex rel. v. Ind. Comm.*, 11 Ohio St. 2d 175, 178, 228 N.E.2d 621 (1967):

"It is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be devised. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress. [Citations omitted.]"

The Kansas statute which sets forth rules of statutory construction is K.S.A. 77-201; it provides in part: "The repeal of a statute does not revive a statute previously repealed, nor does the repeal affect *any right which accrued*, any duty imposed, any penalty incurred or *any proceeding commenced*, under or by virtue of the statute repealed." (Emphasis added.) We believe Chapman had a substantive right to a jury trial under the previously existing state law. Although this right could be modified, the repeal of the law which conferred the right should not have a retroactive effect so as to deprive Chapman of the jury trial to which he was entitled.

It is difficult to conceive of a more fundamental right than an accused's right to a jury trial. In the absence of clear statutory language to the contrary, we believe the legislature intended the statutory changes, discussed here, to operate prospectively only, and not retroactively.⁷

In *McCabe*,⁸ the Kansas Court of Appeals addressed the issue of retroactivity. The Kansas Uniform Trust Code (KUTC) was amended in 2003 to allow a court to impose double damages when a trustee embezzles trust funds for his or her own use. McCabe

⁶ *State v. Chapman*, 15 Kan. App. 2d 643, 814 P.2d 449 (1991).

⁷ *Id.* at 646-47.

⁸ *McCabe v. Duran*, 39 Kan. App. 2d 450, 180 P.3d 1098 (2008).

sued the estate of a former trustee for embezzlement and a jury found in favor of McCabe. Some of the embezzlement took place prior to the 2003 amendment. McCabe then sought double damages under the 2003 amendment to the KUTC. Duran argued the double damages clause could not be applied retroactively. The district court granted McCabe's request for double damages, but the Kansas Court of Appeals vacated and remanded, stating:

As a general rule, a statute operates prospectively unless its language clearly indicates the legislature intended it to operate retroactively. *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 220, 73 P.3d 753 (2003). There is an exception to this rule where the statutory change is procedural or remedial and does not prejudice a party's substantive rights. *State v. Martin*, 270 Kan. 603, 608-09, 17 P.3d 344 (2001). Because substantive laws affect vested rights, they are not subject to retroactive legislation because doing so would constitute the taking of property without due process. *Owen Lumber Co.*, 276 Kan. at 221-22. When evaluating the effect on vested rights, the Kansas Supreme Court noted the importance of "the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction." *Owen Lumber Co.*, 276 Kan. at 223 (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]). In applying the *Owen Lumber* analysis, the Kansas Court of Appeals has noted three factors to consider in determining whether retroactive legislation violates due process: (1) the nature of the rights involved; (2) how retroactive application would affect those rights; and (3) the public policy interest furthered by the legislation. *In re Care & Treatment of Hunt*, 32 Kan. App. 2d 344, 363, 82 P.3d 861, rev. denied 278 Kan. 845 (2004).

In this case, the district court applied K.S.A. 58a-1002(a)(3) and imposed double liability for amounts embezzled or converted by a trustee. Thus, Bess-Littrell's property interests are at stake – namely the amount of money she (now through her estate) would be liable for beyond the amount misappropriated. Retroactively applying K.S.A. 58a-1002(a)(3) would impose the double-liability penalty on actions taken when no such penalty existed. Although this provision might serve public policy interests by deterring and punishing wrongdoers, such a policy interest cannot overcome the due-process problem of retroactively applying the statute. Trustees would be subject to a penalty that was enacted well after any wrongdoing took place. Doing so would also contradict the general rule that penal [statutes] should be strictly construed in favor of those subject to their application. *In re Trusteeship of McDonald*, 16 Kan. App. 2d 293, 295-96, 822 P.2d 637 (1991) (declining to extend the reach of K.S.A. 59-1704 – which imposes double liability to any person who converts the property of a decedent or conservatee – to a trustee who embezzles trust funds, noting that the statute is penal in nature and should be strictly construed).⁹

⁹ *Id.* at 452-53.

In *Jackson*,¹⁰ the Kansas Supreme Court noted:

While generally statutes will not be construed to give them retrospective application unless it appears that such was the legislative intent, nevertheless when a change of law merely affects the remedy or law of procedure, all rights of action will be enforced under the new procedure without regard to whether they accrued before or after such change of law and without regard to whether or not the suit has been instituted, unless there is a savings clause as to existing litigation. *Davis v. Hughes*, 229 Kan. at 101; *Lakeview Village, Inc., v. Board of Johnson County Comm'rs*, 232 Kan. 711, 659 P.2d 187 (1983).

Retroactive application of a Kansas Workers Compensation Act provision has been addressed on several occasions by the Kansas appellate courts. In *Lyon*,¹¹ the issue was whether a 1967 amendment to K.S.A. 44-501 should be applied retroactively. The amendment provided compensation was not payable in cases of coronary or coronary artery disease or cerebrovascular injury unless it was shown the exertion of the work necessary to precipitate the disability was more than the worker's usual work (the so-called heart amendment). *Lyon* died as the result of a coronary occlusion in 1962. *Wilson* argued the heart amendment should be applied retroactively. The Kansas Supreme Court disagreed, stating:

The liability of an employer to an injured employee arises out of contract between them, and the terms of a statute are embodied in that contract. The injured employee must therefore recover on the contract, and his cause of action accrues on the date of the injury. The substantive rights between the parties are determined by the law in effect on the date of injury. Amendments to the compensation act which are merely procedural or remedial in nature, and which do not prejudicially affect substantive rights of the parties, apply to pending cases. The general rule, however, is that a statute will operate prospectively rather than retrospectively, unless its language clearly indicates that the legislature intended the latter, and that retrospective application will not be given where vested rights will be impaired. (*Johnson v. Warren*, 192 Kan. 310, 387 P.2d 213; *Ward v. Marzolf Hardwood Floors, Inc.*, 190 Kan. 809, 378 P.2d 80; *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197; *Ellis v. Kroger Grocery Co.*, 159 Kan. 213, 152 P.2d 860, 155 A.L.R. 546.)

We regard the amendment as one directly affecting the rights and obligations of the parties to the employment contract. It prescribes that compensation will be paid in coronary and cerebrovascular cases only under certain conditions. Prior to the amendment the statute made no distinction. The amendment contains no language disclosing an intention that it should be applied

¹⁰ *Jackson v. American Best Freight System, Inc.*, 238 Kan. 322, 324-25, 709 P.2d 983 (1985).

¹¹ *Lyon v. Wilson*, 201 Kan. 768, 443 P.2d 314 (1968).

retrospectively. It, therefore, will be given prospective application to those injuries occurring subsequent to its effective date.¹²

The 2011 version of the Kansas Workers Compensation Act contains no provision indicating the Kansas Legislature intended it to be retroactively applied. The Kansas Supreme Court provided guidance on this issue in *Bryant*¹³ by stating:

As a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operate retroactively. *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 220, 73 P.3d 753 (2003). Even if the legislature expressly states that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application. Substantive rights include rights of action “for injuries suffered in person.” *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 667, 831 P.2d 958 (1992) (citing the Kansas Constitution Bill of Rights, § 18). The retroactive application of laws that adversely affect substantive rights violates a claimant’s constitutional rights, because it constitutes a taking of property without due process of law. *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 190, 883 P.2d 1177 (1994).

Nothing in the language of the Substitute for H.B. 2134 suggests that the legislature intended that the sections relevant to the present case be applied retroactively. In fact, the legislature singled out one section, new K.S.A. 44-529(c), for retroactive application and was silent about the application of the remainder of the statutory amendments. In addition, Bryant has a vested right to seek compensation for his injury, and retroactive application would violate due process.¹⁴

In *Welty*,¹⁵ the Kansas Court of Appeals cited *Bryant*, stating:

Recent Kansas Supreme Court rulings have persuaded us that we need to take a closer look at this particular amendment to the statute. Our Supreme Court in *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-10, 214 P.3d 676 (2009), directed the appellate courts to give effect to the express statutory language of the legislature and to avoid adding things not readily found within the language of the statute at hand. Later then, in *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 588, 257 P.3d 255 (2011), the court held that the significant changes made to the workers compensation statutes in 2011 did not apply to Bryant’s case and the statutory scheme in place at the time of his injury and claim controlled. 292 Kan. at 588. The *Bryant* court reasoned:

¹² *Id.* at 774.

¹³ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

¹⁴ *Id.* at 588-89. Of note, the Board can find no evidence K.S.A. 44-529 was amended in 2011.

¹⁵ *Welty v. U.S.D. No. 259*, 48 Kan. App. 2d 797, 302 P.3d 1080 (2012).

“As a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operate retroactively. [Citation omitted.] Even if the legislature expressly states that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application. Substantive rights include rights of action ‘for injuries suffered in person.’ [Citations omitted.] The retroactive application of laws that adversely affect substantive rights violates a claimant’s constitutional rights, because it constitutes a taking of property without due process of law. [Citation omitted.]” 292 Kan. at 588.

When read together, *Bergstrom* and *Bryant* persuade us that what is critical in this determination is the language used in the particular statute at issue. Here, we see nothing in the language of the statute that indicates a legislative intent that it be applied retroactively. Secondly, a fair reading of *Bryant* and *Bergstrom* leads us to believe that substantive rights are immune from retrospective statutory application. We are simply not persuaded that this amendment to the law was a mere procedural change that had no effect to deprive some injured workers of benefits that were vested in them.

We note that the law recognizes that the right to compensation accrues from the date of injury. See K.S.A. 44-535. In *Kimber v. U.S.D. No. 418*, 24 Kan. App. 2d 280, 282, 944 P.2d 169 (1997), the court held:

“In determining this issue it is important to consider one of the basic principles governing liability of an employer under the acts set forth in K.S.A. 44-535. That statute provides that the right to compensation under the act shall be deemed in every case to have accrued to the injured worker at the time of the accident. [Citation omitted.]”

It is obvious that at the time of the accident Welty suffered here, K.S.A. 2006 Supp. 44-523(f) did not exist. And under the doctrine of law set out above, her substantive rights were determined by the law in existence at the time of her accident. Welty points out to us that the two Board members who dissented in her case have now come around to her way of thinking on the application of K.S.A. 2006 Supp. 44-523(f) and refer to a recent Board decision by attaching it as a supplement to her brief. *Rivas v. Rickert*, No. 1,007,167 (WCAB September 20, 2011).¹⁶

In *Welty*, the Kansas Court of Appeals observed K.S.A. 44-523(f) did not exist prior to the 2006 amendments to the Act. The court also noted that under the doctrine set forth in K.S.A. 44-535, claimant’s right to compensation is deemed to accrue at the time of the

¹⁶ *Id.* at 801-02.

accident. The Board chooses to follow the precedent set by the appellate courts in *Bryant* and *Welty*.

To summarize, the Board will not apply K.S.A. 2011 Supp. 44-510d(b)(24) because:

1. The 2011 amendments to the Kansas Workers Compensation Act contain no provision that the legislature intended that the sections relevant to the present case be applied retroactively.

2. K.S.A. 2011 Supp. 44-510d(b)(24) affects the method of calculating claimant's award, which is a substantive matter, not procedural. Changing the method of calculating claimant's award would drastically reduce the amount of disability benefits claimant would receive and, thus, affect his substantive right to compensation.

3. K.S.A. 44-505(c) provides claimant's rights shall be governed by the laws in effect at the time of his accident and K.S.A. 44-535 provides the right to compensation for an injured worker shall be deemed in every case to have accrued at the time of the accident.

CONCLUSION

K.S.A. 2011 Supp. 44-510d(b)(24) has no retroactive application to workers compensation claims where the accident occurred prior to May 15, 2011.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the February 11, 2014, Award entered by ALJ Belden.

IT IS SO ORDERED.

¹⁷ K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of July, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable William G. Belden, Administrative Law Judge